[Case Title]C.J.Rogers, Inc., Grabscheid v Textron Financial
[Case Number]91-20388
[Bankruptcy Judge]Arthur J. Spector
[Adversary Number]94-3189
[Date Published]November 30, 1994

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: C.J. ROGERS, INC., Case No. 91-20388
Chapter 7

Debtor.
_____/

WILLIAM H. GRABSCHEID, Trustee,

Plaintiff,

-v- A.P. No. 94-3189

TEXTRON FINANCIAL CORPORATION,
a Delaware corporation,

Defendant.

_____/

APPEARANCES:

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Attorney for Plaintiff

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Attorney for Defendant

OPINION REGARDING MOTION TO DISMISS

INTRODUCTION

C.J. Rogers, Inc., filed a petition for relief under chapter 11 of the Bankruptcy Code on March 28, 1991. William H. Grabscheid was appointed as trustee on March 24, 1992. On September 30, 1992, the case was converted to chapter 7, and Grabscheid was subsequently appointed as chapter 7 trustee. He filed this preference action against Textron Financial Corporation on March 22, 1994. Textron filed a motion to dismiss the action based on its contention that "[t]he statute of limitations period provi

DISCUSSION

Section 546(a) provides that "[a]n action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of–(1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or (2) the time the case is closed or dismissed." The complaint is based on §547(b), which states that "the trustee may avoid any transfer of an interest of the debtor in property" when certain conditions specified in the statute are satisfied. 11 U.S.C. §547(b). In the chapter 11 case where there is no trustee, such an action can also be brought by a debtor in possession pursuant to §1107(a). That section generally provides the debtor in possession with the same rights as a chapter 11 trustee, but states that those rights are "[s]ubject to any limitations on a trustee serving in a [chapter 11] case." 11 U.S.C. §1107(a). See also 11 U.S.C. §1101(1) ("'[D]ebtor in possession

Since a debtor in possession's right to file a §547(b) action is subject to the same restrictions as apply to a trustee, Textron argues §546(a)(1)'s two year limitation period must start

to run when the debtor in possession came into being—i.e., when the Debtor's chapter 11 petition was filed. And since the complaint was filed more than two years after the chapter 11 case commenced, the argument continues, it is untimely. For the reasons which follow, I reject Textron's contention that the limitation per

Under §1107(a), the powers of the debtor in possession are circumscribed in the same manner as are the powers of a trustee. There are two plausible interpretations as to what this means with respect to §546(a)(1). First, it could be argued that, since §546(a)(1)'s limitation period is geared to the appointment of a trustee, the statute is inherently trustee-specific. Thus while §1107(a) subjects the debtor in possession to various restrictions concerning the trustee's power, such as those found in

The alternative interpretation of the interplay between §§546(a)(1) and 1107(a) is set

> [Section 546(a)] is not directed at limiting the authority of trustees to recover property. Rather, it establishes the time period within which an [avoidance] action may be commenced. . . . It provides that no one may bring [such an] action more than two years after the appointment of the enumerated trustees, not that the enumerated trustees may not commence an avoidance action more than two years after their appointment. Thus, by its terms, §546(a) applies both to trustees and debtors in possession, requiring both to commence an action within the specified time periods. The appointment of the various trustees is merely the starting point from which the clock begins to run in paragraph (1). Accordingly, an application of the plain language of §546(a)(1) is not . . . inconsistent with . . . §1107(a).

In re Maxway Corp., 27 F.3d 980, 983-84 (4th Cir. 1994) (emphasis added). Under this view, on those relatively infrequent occasions when a debtor assumes the duties of debtor in possession after a trustee was appointed—such as might occur in a case converted to chapter 11 from chapter 7, see 11 U.S.C. §§706(a) and 348(e)—§546(a)(1) (with or without §1107(a)'s "same-limitations" proviso) prohibits the debtor in possession from filing an avoidance action more than two years after the date of such appointment.

The virtue of both of the foregoing interpretations lies in the fact that they do no violence to §1107(a), while still giving effect to the language in §546(a)(1) specifying that the event which triggers the running of the statute's two-year limitation period is "the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202." See In re Jones, 152 B.R. 155, 168 (Bankr. E.D. Mich. 1993) (collecting cases for the proposition "that statutes are to be read harmoniously wherever feasible"). Of course, neither interpretation is availing to Textron, because they attach no significance to the advent of the debtor in possession vis-a-vis the commencement of §546(a)(1)'s two-year limitation period.

The interpretation which Textron advocates is a variation of that endorsed by Maxway. Like the court in Maxway, it took the position that §546(a)(1) applies to both trustees and debtors in possession (although Textron would presumably argue that this is true only by dint of §1107(a)'s same-limitations proviso). As stated earlier, however, Textron went a step further in asserting that the event which starts the running of the limitation period is the debtor's ascension to the status of debtor in possession. Because this assertion flies in the face of §546(a)(1)'s express language, it is not surprising that many courts—including this one—have repudiated it. See, e.g., Maxway, 27 F.3d at 982, 984 (collecting cases); In re Farrell & Howard Auctioneers, 26 B.C.D. 146, 148 (Bankr. D. Mass. 1994); In re Everlock Fastening Systems, No. 90-19149, 1993 Bankr. LEXIS 2220, at *2-7 (Bankr. E.D. Mich. Dec. 13, 1993) (Shapero, J.); In re Freedom Ford, 140 B.R. 585, 587, 22 B.C.D. 1524 (Bankr. M.D. Fla. 1992); In re Pullman Constr. Indus., 132 B.R. 359, 360-61, 22 B.C.D. 260, 25 C.B.C.2d 1177 (Bankr. N.D. Ill. 1991) (collecting cases); In re Britton, 66 B.R. 572, 575 (I

A number of courts, however, have ruled based on §1107(a) that §546(a)(1)'s two-year limitation period starts to run when the debtor in possession comes into being. See, e.g., In re Century Brass Products, 22 F.3d 37, 39-40 (2d Cir. 1994); In re Coastal Group, 13 F.3d 81, 86 (3d Cir. 1994); In re Softwaire Centre Int'l, 994 F.2d 682, 684 (9th Cir. 1993); Zilkha Energy Co. v. Leighton, 920 F.2d 1520, 1524 (10th Cir. 1990); In re Knapp, 146 B.R. 294, 296 (Bankr. M.D. Fla. 1992); In re Lill, 116 B.R. 543,

The first argument was expressed by one court as follows:

> We do not believe that Congress intended to limit actions filed by an appointed trustee to two years without making the same restriction apply to a debtor in possession who is the functional equivalent of an appointed trustee. Because of the virtual identity of function between a trustee and a debtor in possession, there would be no reason to create a different limitation period for the f

Zilkha, 920 F.2d at 1524.

There are two problems with this analysis. First, it is based on policy, rather than statutory construction. Zilkha does not suggest—and there is no basis for asserting—that §546(a)(1) would lead to absurd results if it were to be applied according to its express terms. Adoption of a non-literal interpretation of that statute is therefore inappropriate. See Maxway, 27 F.3d at 984 ("Application of the

plain language of §546(a)(1) in Chapter 11 cases would not produce an absurd result, nor is it inconsistent with the language of or contrary to the legislative history of §1107(a)."); In re Walnut Tool & Die, No. 89-14958, 1994 WL 612140, at *9 (Bankr. E.D. Mich. Nov. 1, 1994) (When a statute is "straightforward, does not lead to absurd results if literally applied, and is not contradicted by [other statutory provisions, the court must] apply the statute as written.").

The other problem with Zilkha's rationale is that there is a good reason to delay the commencement of §546(a)(1)'s limitation period until a trustee has been appointed. As the Fourth Circuit noted:

> [D]ebtors in possession are not likely to commence avoidance actions, if for no other reason, because they are normally more interested in preserving relationships with their creditors than in maximizing the size of the estate. See, e.g., . . . [In re Tamiami Range & Gunshop, Inc.], 130 B.R. 617, 619[, 21 B.C.D. 1366] (Bankr. S.D. Fla. 1991) (recognizing that a debtor in possession may also actively seek to delay a Chapter 11 administration beyond the two-year statute of limitations without pursuing an avoidance action in order to bar action against family or friends) . . . . [P]ostponing the start of the two-year statute of limitations until the appointment of a trustee who is likely to bring an avoidance action prevents any delay in the commencement of such an action from penalizing unsecured creditors who would benefit from the recovery of a preferent

Maxway, 27 F.3d at 984. Cf. Everlock, 1993 Bankr. LEXIS 2220 at *7 ("When a trustee is appointed under §1104, although reorganization remains theoretically possible, it is more likely that a liquidation plan or a conversion will ensue precipitating objective and focused attention on such things as §547 or other such action

The second argument advanced by these cases is that their interpretation does not impermissibly alter §546(a)(1). As the Third Circuit reasoned, "section 1107(a) authorizes this court to read the word 'trustee' in §§547 and 553 to include a 'debtor in possession.' Insofar as we conclude that §1107(a) similarly authorizes this court to read the word 'trustee'—or, more broadly, the phrase 'trustee appointed under . . . .'—in §546(a)(1) to include a 'debtor in possession,' the two provisions do not conflict." Coastal Group, 13 F.3d at 85. See also Century Brass Products, 22 F.3d at 39 ("Though [§546(a)] itself does not mention debtors in possession, that omission cannot be dispositive, for neither does §547 itself permit a DIP to bring a preference avoidance action."); Zilkha, 920 F.2d at 1524 ("[I]t is . . . apparent that Congress intended for the word 'trustee' to apply to a debtor in possession, for every reference to actions b

A major weakness in this argument is its assumption that §546(a)(1) is not by its own terms applicable to debtors in possession. For the reasons explained in Maxway, see supra p. 3, that assumption is questionable. And even if it were correct, there are other problems with Coastal Grou

It is true in a sense that those provisions which, like §547(b), vest the trustee with specific powers are rewritten by §1107(a) to include the words "or debtor in possession" immediately following references to the "trustee." But these provisions must be so read in order to give effect

Such is not the case with respect to §546(a)(1). Of the various provisions in §546 which define the parameters of a trustee's powers, only paragraph (a)(1) uses the appointment of a trustee as a reference point. The remaining provisions—§§546(b) through (g)—are clearly made applicable by §1107(a) to the debtor in possession regardless of how one interprets §546(a)(1)'s "appointment" language. Thus rejection of Coastal Group's interpretation does not render §1107(a)'s same-limitations proviso meaningless.

Moreover, there is a vast difference in the extent to which Coastal Group's interpretation of §1107(a) would impact on §546(a)(1) as compared to provisions like §547(b). The conclusion that the debtor in possession enjoys the same rights as are conferred on the trustee under §547(b) does not entail changing the basic structure of that statute. But §546(a)(1) specifically refers to "the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202." A debtor in possession is neither "appointed" nor, in the case of §702, elected. See generally Coastal Group, 13 F.3d at 84 (noting that §546(a)(1)'s use of the term "appointment" . . . has been construed as general enough to include elected trustees"). Contrary to Coastal Group's suggestion, then, its interpretation necessitates a substantial overhaul of §546(a)(1)'s express language.

In an indirect way, the very cases which support Textron's position acknowledge that their revision of §546(a)(1) is not as simple as they let on. None of these cases involved a situation in which a trustee had been appointed, and several explicitly left open the possibility that such an appointment might start a new limitation period. See Century Brass, 22 F.3d at 41; Coastal Group, 13 F.3d at 86 n.7; Zilkha, 920 F.2d at 1524 n.11.

The caution shown by these courts with regard to that issue is understandable, because their interpretation of §546(a)(1) requires that they choose between two unattractive alternatives.

On the one hand, if they were to hold that the advent of a trustee does not start the clock running again, then they are rewriting §546(a)(1) so that in cases where there was a debtor in possession, the appointment of a trustee is irrelevant for purposes of that statute.

On the other hand, if these courts were to hold that a fresh limitation period begins when a trustee succeeds the debtor in possession, then they are in effect modifying §546(a)(1) to provide that two events—the assumption of the duties of debtor in possession and the appointment of a trustee—trigger the running of a two-year limitation period, and that these limitation periods are independent of one another. See Farrell & Howard Auctioneers, 26 B.C.D. 148") (describing this result as "not

If one accepts the premise that §§546(a)(1) and 1107(a) establish a two-year limitation period for filing avoidance actions that commences on the date the debtor in possession comes into being, those statutes provide no real guidance as to which of the foregoing holdings would be approp

Conversely, if one rejects that premise, courts are not faced with this dilemma: consistent with the language of §546(a)(1), the trustee has two years to file avoidance actions, regardless of whether she succeeds a debtor in possession. These considerations above demonstrate that the reasoning in Zilkha and its ilk is flawed. Cf. Freedom Ford, 140 B.R. at 587 (In allowing for a different result where a chapter 11 trustee is appointed, Zilkha "'hedge[d] against the box' by acknowledging that [its] ana

Because the arguments advanced for the contrary view are unpersuasive, I reaffirm the position which I took in Bitton, supra p. 5, by holding that the 2-year limitation period established by §546(a)(1) does not begin to run until a trustee is appointed. This means that Grabscheid had until at least March 24, 1994 (the second anniversary of his appointment as chapter 11 trustee) to bring this complaint. See generally McCuskey v. Central Trailer Servs., 26 B.C.D. 188, 190 (8th Cir. 1994) (collecting cases pro and con regarding the issue of whether §546(a)(1)'s limitation period "start[s] anew with the appointment of a new trustee"). Since the complaint was filed within that time frame, Textron's motion to dismiss w

Dated: November 30, 1994.

ARTHUR J. SPECTOR
U.S. Bankruptcy Judge

As suggested supra at pp. 9-10, the same result might obtain even if §546(a)(1)'s two-year limitation period began to run at the inception of this case. In fact, the 9th Circuit—the court which decided Softwaire—assumed without discussion in a subsequent case that a trustee's 2-year limitation period is not diminished by the period of time during which the debtor served as debtor in possession. See In re San Joaquin Roast Beef, 7 F.3d 1413, 1415 (9th Cir. 1993); see also In re Kent Holland Die Casting & Plating, 928 F.2d 1448, 1449 (6th Cir. 1991) (making the same implicit assumption). And other courts, although agreeing with or bound by cases which hold that the debtor in possession has only two years under §546(a)(1) within which to file an avoidance action, have explicitly held that a new two-year limitation period commences upon the appointment of a trustee. See, e.g., In re Ted A. Petras Furs, 26 B.C.D. 27, 29 (Bankr. E.D. N.Y. 1994); In re Luria Steel and Trading Corp., 168 B.R. 913, 917 (Bankr. N.D. Ill. 1994); In re Colonial Realty Co., 168 B.R. 512, 519, 25 B.C.D. 1170 (Bankr. D. Conn. 1994).